(20,142.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 739.

ROBERT L. OWEN, PLAINTIFF IN ERROR,

vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DUDLEY & MICHENER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 1821.

WILLIAM W. DUDLEY ET AL., Appellants,
vs.
ROBERT L. OWEN.

a Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Declaration, &c.*

Filed July 14, 1906.

In the Supreme Court of the District of Columbia.

No. 48670. At Law, Docket No. —.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

The plaintiffs sue the defendant for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant; and for goods sold and delivered by the plaintiffs to the defendant; and for work done and materials provided by the plaintiffs for the defendant, at his request; and for money lent by

the plaintiffs to the defendant; and for money paid by the plaintiffs for the defendant at his request; and for money received by the defendant for use of the plaintiffs; and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

And the plaintiffs claim $10,000.00 with interest at the rate of 6 per cent. per annum from the 14th day of July 1906.

Second Count.

2 And the said Plaintiffs by their said Attorneys for a second count to their said declaration, sue the said Robert L. Owen, for money payable by the said Robert L. Owen, to the Plaintiffs, for that heretofore to wit, on or about the 28th day of May A. D. 1902, the said Robert L. Owen and the said Plaintiffs by their contract under seal duly delivered and executed did promise and agree in words and figures following, to wit:

"This memorandum of agreement witnesseth: That John Vaile, Esq., of Fort Smith, Ark., having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of Feb. and April, 1900, and ratified a third time by Act of Council of Sept. 4, 1901;

And whereas, the said John Vaile has employed the services of Robert L. Owen of Muscoga, Indian Territory, under his aforesaid contract;

Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners of the firm of Dudley & Michener, the sum of ten thousand dollars ($10,000) out of the fee so placed to the said Owen, immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid,

3 but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fees to the said Dudley & Michener, but it is understood and agreed that he will in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley and Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate Counsel in this case.

Witness our hands and seals in duplicate on this 28th day of May, 1902.

(Signed) ROBERT L. OWEN. [SEAL.]
(Signed) DUDLEY & MICHENER. [SEAL.]"

And the Plaintiffs in fact say that, although they have faithfully kept, done, and performed each and everything by said writing on their part agreed to be kept, done and performed and although the said Robert L. Owen hath collected all the fees in said contract to be collected, the said Robert L. Owen hath failed hitherto and still doth fail to keep, carry out and perform the agreement on his part so to be kept, carried out and performed and especially and particularly hitherto hath failed to convey and pay to the Plaintiffs the said sum of ten thousand dollars ($10,000) to the great damage and injury of the Plaintiffs, wherefore they bring this suit and claim $10,000 with interest from this date, besides costs.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiffs.

4 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof: otherwise judgment.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiff-.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

William W. Dudley swears that he is one of the plaintiffs named in the declaration to which this affidavit is attached; that the plaintiffs' cause of action therein is based upon a contract under seal made and executed on May 28, 1902, by the plaintiffs and the defendant a true copy of which is hereto annexed and made a part hereof and that the plaintiffs have done everything on their part agreed to be done by the terms of said contract; that the defendant has collected the money mentioned in said contract in full as set forth, but hath failed to pay or convey to the plaintiffs the said sum of ten thousand dollars as the defendant agreed by the terms of said contract to pay and convey and that the sum of $10000.00 with interest, from this date as therein claimed, is justly due and owing to the plaintiffs from the defendant by reason of the premises, exclusive of all set-offs and just grounds of defense.

WILLIAM W. DUDLEY.

Subscribed and sworn to before me this 14th day of July, 1906.

[SEAL.] M. S. W. DAY,
Notary Public.

5 *Defendant's Plea.*

Filed October 1, 1906.

In the Supreme Court of the District of Columbia, the First Day of October, 1906.

No. 48670. At Law.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

I. The defendant, for plea to the first count of the declaration, says that he did not promise in manner and form as therein alleged.

II. The defendant, for plea to the second count of the declaration, says that he did not promise in manner and form as therein alleged.

* * * * * * *

WM. H. ROBESON,
Attorney for Defendant.

Joinder of Issue.

Filed October 12, 1906.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

6 The plaintiffs hereby join issue with the defendant upon his plea to the first count of plaintiffs' declaration and upon his second plea to the second count of plaintiffs' declaration.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for Plaintiffs.

Stipulation for Trial by the Court Without a Jury.

Filed May 22, 1907.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

It is hereby agreed by the parties to this suit that the issues of fact may be tried and determined by the court without the intervention of a jury and a jury in said trial is hereby waived, according to the terms and provisions of Sections 70 and 71 of the Code of the District of Columbia.

SAM'L A. PUTMAN,
CHAS. POE,
Attorneys for the Plaintiffs.
WM. H. ROBESON,
Attorney for the Defendant.

7 Supreme Court of the District of Columbia.

MONDAY, *July* 8, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 48670.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley and Michener, Pl't'fs,
vs.
ROBERT L. OWEN, Def't.

Now again come here the parties aforesaid, in manner aforesaid: whereupon this cause having heretofore been heard by the Court, the Court finds the matters of difference between the parties in favor of the defendant.

Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendant go thereof without day, and recover against the plaintiffs the costs of his defense, to be taxed by the Clerk and have execution thereof.

The plaintiffs note an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of the bond for costs upon said appeal is hereby fixed in the sum of one hundred dollars ($100).

8 *Memoranda.*

July 12, 1907.—Bill of exceptions submitted to court.
July 12, 1907.—Appeal bond filed.

Supreme Court of the District of Columbia.

SATURDAY, *July* 20, 1907.

Session resumed pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * * * *

By Justice Wright.

At Law. No. 48670.

WILLIAM W. DUDLEY ET AL., Pl'ff's,
vs.
ROBERT L. OWEN, Def't.

Now come here the plaintiffs by their Attorneys and pray the Court to sign, seal and make part of the record, their bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

9 *Bill of Exceptions.*

Filed July 20, 1907.

In the Supreme Court of the District of Columbia.

No. 48670. At Law.

WILLIAM W. DUDLEY ET AL., Plaintiffs,
vs.
ROBERT L. OWEN, Defendant.

At the trial of this cause before Mr. Justice Wright without a jury, after the offer of testimony on behalf of the plaintiffs and defendant, the Court, at the request of the plaintiffs, found the following facts to have been proven:

On May 28, 1902, the plaintiffs and the defendant entered into the following contract:

This memorandum of agreement witnesses that John Vaile, Esquire, of Fort Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of Council of September 4th, 1901;

And whereas, the said John Vaile has employed the services of

Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts:

Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T.
10 Michener, partners, of the firm of Dudley & Michener, the . . sum of Ten Thousand Dollars ($10,000.00), out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this twenty-eighth day of May, 1902.

ROBERT L. OWEN. [SEAL.]
DUDLEY & MICHENER. [SEAL.]

Thereafter the plaintiffs, on their part, gave to the defendant their co-operation, assistance and services in the prosecution and
11 collection of the claim referred to in said contract, as said contract provided they should do.

On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

"THE SOUTHERN,
ST. LOUIS, *April* 17, 1905.

Dudley & Michener, Washington, D. C.

GENTLEMEN: I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly, R. L. OWEN."

A few days thereafter, the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Su-

preme Court to the Court of Claims, the defendant, Owen,
12 who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent. of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the Court apportioned the fee of 15 per cent. among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the Court, and the Court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the Court, have claimed any fee except by permission of the said attorneys of record.

Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the Court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905.

The defendant has never paid to the plaintiffs any sum on
13 account of the said contract between him and plaintiffs.

Whereupon the plaintiffs prayed the Court to find the following conclusions of law:

The plaintiffs request the Court to find as a matter of law that under the pleadings and evidence in this case, it was not incumbent upon the plaintiffs to make proof of services in the Court of Claims to entitle them to recover.

The plaintiffs request the Court to render a judgment in favor of them on the pleadings and all the evidence in the cause, for the sum of Ten Thousand Dollars ($10,000.00), with interest from July 14, 1906.

Which conclusion of law the Court refused to find; to which action of the Court in refusing to find each of said conclusions of law the plaintiffs then and there excepted, and the judgment of the Court being against the plaintiffs, and in favor of the defendant, the plaintiffs have prayed an appeal to the Court of Appeals of the District of Columbia, which hath been allowed, and in order that the matters and things in their Bill of Exceptions which otherwise would not appear of record, may be so made to appear and that it may be known that the above findings are all the facts in this cause, said plaintiffs prayed the Court to sign this their Bill of Exceptions, which is accordingly done and made of record, this 20th day of July, A. D. 1907, now for then.

DAN THEW WRIGHT, *Justice.* [SEAL.]

14 *Instructions for Preparation of Record on Appeal.*

Filed July 20, 1907.

At Law. No. 48670.

W. W. DUDLEY ET AL.
vs.
R. L. OWEN.

John R. Young, Esquire, Clerk, &c., &c.

SIR: In making up the Record on Appeal to the Court of Appeals of the District of Columbia you will include the following papers, The Declaration—The pleas to which the demurrer was not interposed—The replication—The stipulation for trial by the Court—Bill of Exceptions—The judgment—The prayer for appeal and order allowing the same and the memorandum as to filing of approved appeal bond—

SAM'L A. PUTMAN,
CHAS. POE,
Att'ys for Pl't'fs.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48670 at law, wherein William W. Dudley, *et al.* are Plaintiffs and Robert L. Owen is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of August, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1821. William W. Dudley *et al.*, appellants, *vs.* Robert L. Owen. Court of Appeals, District of Columbia. Filed Aug. 12, 1907. Henry W. Hodges, clerk.

TUESDAY, *February* 18*th*, *A. D.* 1908.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

The argument in the above entitled cause was commenced by Mr. Charles Poe, attorney for the appellants.

WEDNESDAY, *February* [illegible]*h*, *A. D.* 1908.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

The argument in the above entitled cause was continued by Mr. W. H. Robeson, attorney for the appellee, and was concluded by Mr. S. A. Putman, attorney for the appellants.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Appellants,

vs.

ROBERT L. OWEN.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court:)

Appellants as plaintiffs below sued to recover the sum of $10,000 and interest. By stipulation of counsel the case was heard before the court without a jury agreeably to the provisions of sections 70 and 71 of the Code. The following facts were found to have been proven:

"On May 28, 1902, the plaintiffs and the defendant entered into the following contract:

This memorandum of agreement witnesseth that John Vaile, Esquire, of Fort Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of council of September 4th, 1901;

And whereas, the said John Vaile has employed the services of Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts:

Now therefore the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners, of the firm of Dudley and Michener, the sum of Ten Thousand Dollars ($10,000.00), out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this twenty-eighth day of May, 1902.

ROBERT L. OWEN. [SEAL.]
DUDLEY & MICHENER. [SEAL.]

Thereafter the plaintiffs, on their part, gave to the defendant their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contract provided they should do.

On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

'THE SOUTHERN,
ST. LOUIS, *April* 17, 1905.

Dudley & Michener, Washington, D. C.

GENTLEMEN: I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly, R. L. OWEN.'

A few days thereafter, the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims, the defendant, Owen, who was one of the attorneys of record in the case in the Court of Claims, together with

his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent. of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the Court apportioned the fee of 15 per cent. among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the Court, and the Court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the said attorneys of record.

Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the Court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905.

The defendant has never paid to the plaintiffs any sum on account of the said contract between him and plaintiffs."

Thereupon plaintiffs requested the Court to render a judgment in their favor, which the Court declined to do, but, on the contrary, found for the defendant.

Did the Court err in its interpretation of this contract, is the question here presented?

When the contract forming the basis of this action was signed (May 28, 1902), it was evidently in the minds of the parties that the provisions of sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States would, in the absence of further legislation, govern the payment of Mr. Owen's fees under the John Vaile contract. In section 2104 it is provided that no money shall be paid to any person for services to any Indian, Indians, or Indian Tribe, under any contract or agreement "until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom, whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the sum may be paid, and, if not, it shall be paid in proportion to the service rendered under the contract."

By section 68 of the Act of Congress of July 1, 1902, (32 Stat. L., pt. 1, 726), Congress conferred jurisdiction upon the Court of Claims to hear and determine any claim, which the Cherokee Tribe or any band thereof, arising under treaty stipulation, might have against the United States. The section further provided that any suit brought under the Act should "be through attorneys employed

and *to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States.*" If further evidence were necessary to convince us that the contract between the parties herein was made with reference to the provisions of the Revised Statutes above referred to, it is to be found in the provisions in the Act of March 3, 1903 (32 Stat. L., pt. 1, 996), specifically fixing the status of "the Eastern Cherokees, so called, including those in the Cherokee Nation," etc., as a band or bands for all purposes of said section 68 of said act of July 1, 1902, and ordaining "that the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit."

If these various provisions are kept in mind the interpretation of the contract becomes much easier since they tend to explain its ambiguities and shed light on what originally was in the minds of the parties. Mr. Owen's contract contemplated that he should receive fifteen per cent. of the amount collected. The Court finds that the full amount was allowed him. Appellants were to receive $10,000 out of the fees so pledged to said Owen or a proportionate amount if Owen failed to collect the entire amount of his fee. Thus far the contract is free from ambiguity. Owen's success measured appellants' success, and his failure meant their failure. Now comes the provision that "in the contingency of said fees (Owen's) not being provided for by legislation * * * but upon proof of services," each party shall look out for himself; Owen, however, "in such a contingency to do what he can to assist" appellants to collect their fee. What was meant by this provision? Unless additional legislation could be secured, Owen feared he might be compelled to file with the Commissioner of Indian Affairs "a sworn statement, showing each particular act of service" under his contract, "giving date and fact in detail," and that he might then be compelled to convince the Secretary of the Interior and the Commissioner of Indian Affairs that the whole of the large amount claimed by him should be paid. It was but natural that he should have stipulated that in such a contingency he would not pay appellants "out of the fees collected for his *personal* service," that is, out of the fees allowed him under his sworn itemized detailed statement to the Commissioner of Indian Affairs. Said section 68 of said Act of July 1, 1902, confirmed the fear entertained by Owen at the time the contract with appellants was entered into, since that Act specifically made applicable the above provision of the Revised Statutes. But, said Act of March 3, 1903, contained the legislation contemplated by Owen's contract with appellants. Under that Act, instead of being compelled to show "each particular act of service" under his contract, he could go before a court and receive compensation upon a much more liberal basis. Instead of being paid by the day he would be paid by results—the measure of his success for his clients would proportionally be the measure of his fee. Surely it was never contemplated by either Owen or appellants that Congress would

directly fix the fee Owen was to receive. All that in reason could have been contemplated was that legislation might be enacted similar to that which was enacted. If the legislation, under which he received his fee, did not come within the letter of the contract, it certainly came within its spirit and hence was within the contract.

The letter of April 17, 1905, from Owen to appellants, if considered in connection with what followed, adds cogency to the above views. When he wrote the letter, Owen evidently thought it might be well to be prepared to supplement his statement as to services rendered by the affidavit of appellants. Within a few days, however, he met one of appellants and informed him that he (Owen) would postpone making application for fees until a later date.

We next find him and his co-attorney of record, Belt, before the Court of Claims where "by agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, the Court apportioned the fee of 15 per cent. among said Owen and Belt *and those associate attorneys, in accordance with their several contracts.*" Unless we are to impute bad faith to Mr. Owen, we must find that after writing appellants he concluded it would not be necessary for them to make any affidavit for his use before the Court of Claims; hence his failure to notify them. That his judgment was correct is evidenced by the allowance of his whole fee of fifteen per cent. That appellants so interpreted the contract is manifest, as otherwise they would not have rested in supposed security while their fee was being frittered away. The affidavit mentioned in Owen's letter was not the affidavit required by the Revised Statutes, but simply an affidavit for Owen's use, which, as we have said, he subsequently determined it was not necessary to have.

Appellants have rendered Owen the services they agreed to render, and he has reaped the benefit. He was to pay them out of his fees unless he should be compelled to collect his fees under existing law. The legislation hoped for and contemplated by the contract was enacted, and upon the allowance of Owen's fees, we think it was incumbent upon him to pay appellants.

The judgment must be reversed, with costs, and the case remanded with directions to enter a judgment for the plaintiffs for $10,000 with interest from July 14, 1906, the date of the inception of this action.

Reversed.

TUESDAY, *April 7th, A. D.* 1908.

No. 1821, April Term 1908.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued

by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court with directions to enter a judgment for the plaintiffs for $10,000 with interest from July 14, 1906, the date of the inception of this action.

Per MR. JUSTICE ROBB,
April 7, 1908.

TUESDAY, *April* 14*th*, *A. D.* 1908.

No. 1821.

WILLIAM W. DUDLEY and LOUIS T. MICHENER, Doing Business under the Firm Name and Style of Dudley & Michener, Appellants,

vs.

ROBERT L. OWEN.

On motion of Mr. W. H. Robeson, attorney for the appellee, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of thirteen thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, Appellants, and Robert L. Owen, Appellee, a manifest error hath happened, to the great damage of the said Appellee as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 14th day of April, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Robert L. Owen, as principal, and Fidelity and Deposit Company of Maryland, a corporation, of Baltimore City, Maryland, as surety, are held and firmly bound unto William W. Dudley and Louis T. Michener in the full and just sum of Thirteen thousand dollars, to be paid to the said William W. Dudley and Louis T. Michener, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of April, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, appellants, and Robert L. Owen, appellee, a judgment was rendered against the said Robert L. Owen and the said Robert L. Owen having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William W. Dudley and Louis T. Michener citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Robert L. Owen shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ROBERT LATHAM OWEN. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By W. H. RONSAVILLE, *Attorney-in-Fact.*

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in the presence of—
A. M. RAWLINGS,
V. W. LANHAM,
Witness to R. L. O.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1821. William W. Dudley *et al.*, &c., Appellants, *vs.* Robert L. Owen. Supersedeas Bond on Writ of Error to S. C. U. S. Court of Appeals, District of Columbia. Filed Apr. 22, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Robert L. Owen is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 22nd day of April, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted April 23, 1908.

SAM'L A. PUTMAN,
Counsel for Defendants in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 23, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 21, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of William W. Dudley and Louis T. Michener, doing business under the firm name and style of Dudley & Michener, Appellants, *vs.* Robert L. Owen, No. 1821, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 25th day of April A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,142. District of Columbia Court of Appeals. Term No. 739. Robert L. Owen, plaintiff in error, *vs.* William W. Dudley and Louis T. Michener, doing business under the firm-name and style of Dudley & Michener. Filed April 28th, 1908 File No. 21,142.

IN THE

Supreme Court of the United States

October Term, 1906.

No. 162.

ROBERT L. OWEN, *Plaintiff in Error*,

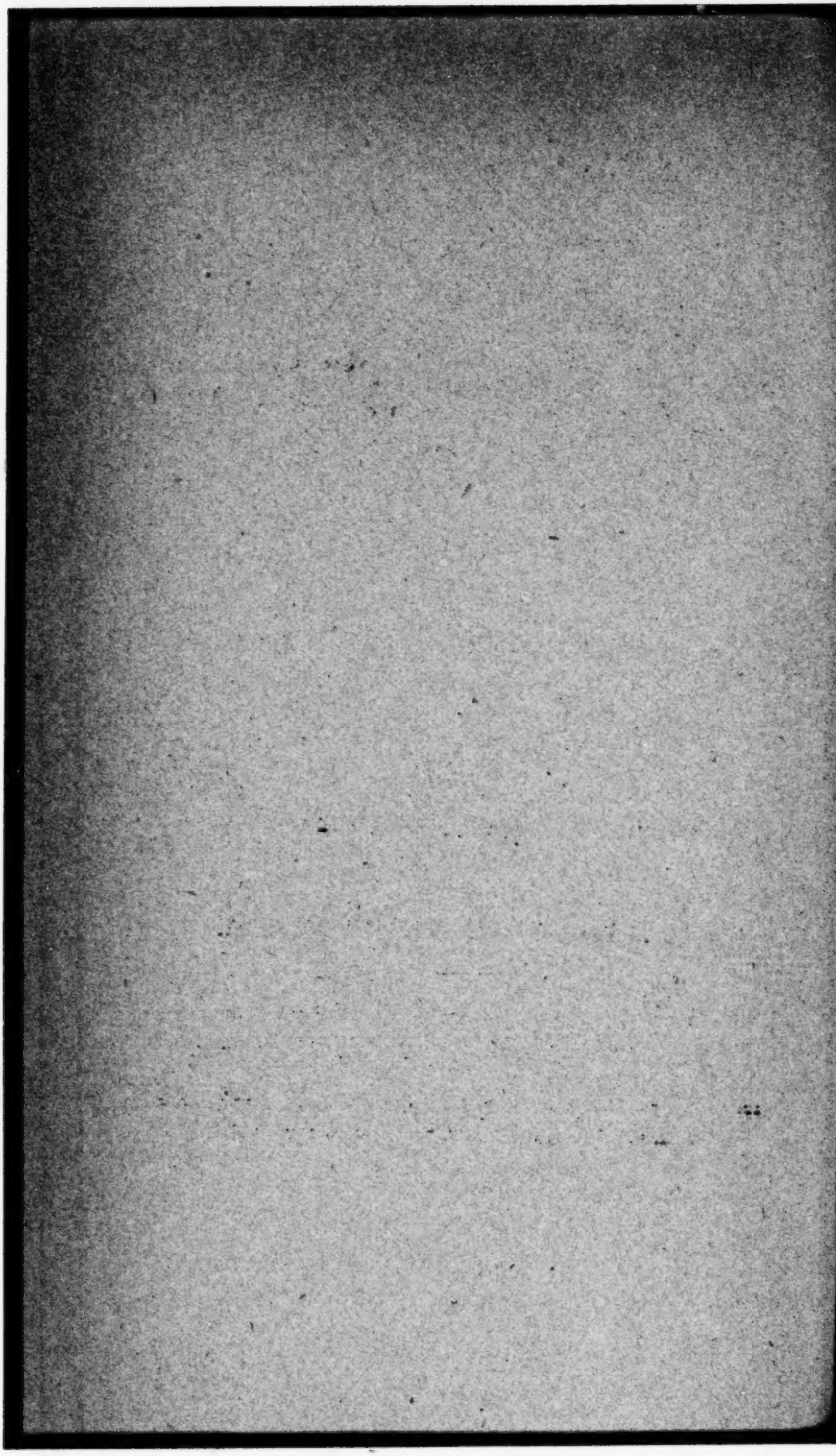
vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, doing business under the firm name of DUDLEY & MICHENER, *Defendants in Error*.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM H. ROBESON,
Attorney for Plaintiff in Error.

WALLACE & CADICK, PRINTERS, WASHINGTON, D. C.



Supreme Court of the United States.

October Term, 1909.

No. 142.

ROBERT L. OWEN, *Plaintiff in Error,*

vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, doing business under the firm name of DUDLEY & MICHENER, *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Pleadings.

This suit was brought upon a certain contract between the parties litigant, which averred the existence of a contract made between the plaintiff in error and one John Vaile, whereby the latter employed plaintiff in error Owen to prosecute a certain claim of the Eastern Cherokees against the United States, and which, providing for the co-operation of defend-

ants in error in the collection of the claim and their assistance as associate counsel stipulated for a fee for the defendants in error of ten thousand dollars ($10,000), out of the fee pledged to plaintiff in error by the said John Vaile, "or in the exact proportion as said fees may be collected," the payment of the fee to defendants in error being contingent upon the collection by the plaintiff in error of his fee.

For convenience of consideration, and with the permission of the court, counsel, instead of using the terms plaintiff in error and defendants in error, will give the names of the parties—Robert L. Owen, being plaintiff in error, and Dudley & Michener, being defendants in error.

The contract between these parties further stipulates that if the fee should not be "provided for by legislation," but should be "collected on proof of services," the parties to the contract should "prove services independently of each other"; and there was a further condition that in the event of the necessity of proving service, Owen was "not to be expected out of fees collected for his personal services to pay the fee of the said Dudley & Michener." (Rec., p. 2.)

The case was heard in the Supreme Court of the District of Columbia without a jury (Rec., p. 5); certain findings of fact made by the Court (Rec., pp. 6, 7 and 8); and judgment awarded for the defend-

ant, Robert L. Owen (Rec., p. 8). From this judgment of the Supreme Court of the District of Columbia an appeal was prayed to the Court of Appeals of the District of Columbia (Rec., p. 5), which reversed the judgment of the inferior court and awarded judgment in favor of Dudley & Michener in the sum of ten thousand dollars ($10.000) (Rec., pp. 14 and 15); whereupon the cause was brought to this Honorable Court by writ of error.

Statement of the Case.

On May 28, 1902, Robert L. Owen entered into a contract with Dudley & Michener, by which the latter firm was to receive a fee of ten thousand dollars ($10,000) by reason of association with the said Owen in the prosecution of a certain claim of the Eastern Cherokees against the United States. This contract recited that John Vaile had been employed by the Eastern Cherokee Council of the Cherokee Indians to prosecute the claim; that Vaile had employed Owen under his said contract and that Owen was to pay Dudley & Michener ten thousand dollars ($10,000) out of the fee Vaile had contracted to pay him. The contract further recited that if the fees contemplated by the contract between Vaile and the Eastern Cherokee Council should not be "provided by legislation," but should be secured upon "proof of services, then and in that event, each of the parties hereto shall prove service independently

of the other, and said Owen shall not be expected, out of the fees collected for his personal services, to pay the fees to the said Dudley & Michener" (Rec., p. 2).

The defence to the suit is that the fee awarded Owen was not collected through John Vaile at all, nor under the contract with Vaile, nor was it "provided by legislation," but it was collected upon "proof of service," made before the Court of Claims in accordance with the Act of Congress conferring jurisdiction upon that court, the pertinent part of which is in these words:

> That the prosecution of such suit upon the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, and their compensation for expense and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; (32 Stat. L., Part 1, page 996)

that Dudley & Michener did not offer to prove service as they had bound themselves to do, and that they could not, therefore, have any fee for themselves out of Owen's fee.

Specifications of Error.

The Court of Appeals was in error—

1. In holding that the proof of service contemplated by the contract was proof to be made before the Commissioner of Indian Affairs.

2. In not holding that the proof of service was the proof which was to be made before the Court of Claims.

3. In holding Owen liable to pay the fee to Dudley & Michener, the payment of which, in any contingency, was based on the validity of the Vaile contract, and the collection of fees thereunder.

4. In not holding that Dudley & Michener must have made proof of service independently of Owen, and that failing to do so, they were not entitled to judgment against him.

5. In not holding that the necessity for proof of service released Owen from the obligation to pay a fee to Dudley & Michener.

6. In not holding that Owen's fee was not subject to be reduced for the purpose of the payment of any fee to Dudley & Michener.

7. In not holding that the failure of Congress to provide for the payment of the fees of attorneys, released Owen from any obligation to Dudley & Michener.

8. In not confirming the judgment of the Supreme Court of the District of Columbia.

Brief of Argument.

All the specifications of error, except the first one, may be considered together as presenting the question whether Owen can be liable to account to Dudley & Michener for a fee.

The contract provides that Dudley & Michener shall have no claim against Owen if proof of service should become necessary.

The Court of Appeals in its opinion referred to proof of service made under Sections 2103 to 2106 of the Revised Statutes of the United States. The particular Section is 2104. It is in these words:

> No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the Tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such persons shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract. (R. S. 2104.)

That this proof of service was not contemplated in the contract between Owen and Dudley & Michener is obvious from the fact that on the third day of March, 1901 (31 Stat., 1073), more than a year before Owen and Dudley & Michener made their contract, every Indian in the Indian Territory was declared to be a citizen of the United States, and the contract was therefore not subject to the provisions of this statute.

The claim of the Eastern Cherokees against the United States was first referred to the Court of Claims under the provisions of the Tucker Act. Under that Act the Court could make only findings of fact. Congress might have made an appropriation in accordance with the findings of fact and might have provided for the fee of the attorneys who represented the Eastern Cherokees. If it had done so, Owen would have been obligated to pay to Dudley & Michener ten thousand dollars ($10,000). But Congress did nothing of the kind.

The Court of Appeals says in its opinion that:

> When the contract forming the basis of this action was signed (May 28, 1902) it was evidently in the mind of the parties that the provisions of Sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States would, in the absence of further legislation, govern the payment of Mr. Owen's fee under the John Vaile contract.

Therein lies the Court's chief error. The Eastern Cherokee Indians on May 28, 1902, were citizens of the United States, and were not subject to the provisions of this law. They had the same right to contract as any other citizens of the United States, and were not subject in the matter of their contracts to the approval of the Commissioner of Indian Affairs, or any other government official. It cannot be, therefore, that Owen and Dudley & Michener had in contemplation the proof of service prescribed by Section 2104.

The other specifications of error, considered together, present the question whether Owen can be liable to account to Dudley & Michener for the compensation they claim.

The contract provided a fee of ten thousand dollars ($10,000) to be paid to Dudley & Michener out of the fee to be awarded to Owen for his services rendered to the Eastern Cherokees in the prosecution of their claim against the United States. That claim was the subject of consideration by this Honorable Court which awarded its judgment on the 26th day of May, 1906 (202 U. S., p. 101).

The contract recited that if the fee which Owen was to receive from John Vaile, who had employed him, was provided by legislation, he, Owen, would pay to Dudley & Michener ten thousand dollars ($10,000). But if the fee was not provided by legisation, and if, on the contrary, it became necessary

to prove service, in order to secure a fee, Dudley & Michener were to proceed independently of Owen to prove their services, if they had rendered any, and that no part of the fee recovered on proof of service by Owen should be taken to pay the fee contracted to Dudley & Michener.

The fee was not provided by legislation but, as we have shown, was awarded by the Court of Claims in accordance with the Statutes of the United States, upon proof of service. Owen proved service, and was awarded a fee. Dudley & Michener did not prove service and were not awarded a fee. Therefore, the simple question is presented, whether, it having been necessary to prove service, and Dudley & Michener having failed to prove service, as they had agreed to do, they can now come, and recover a fee from Owen with whom they had specifically contracted that no part of his fee should be taken to pay the fee claimed by them. The record precludes any inquiry into the question of the character or extent of Dudley & Michener's services under the contract sued upon. The fees were not provided for by legislation, but Congress, as we have stated, directed the Court of Claims to fix the fees of attorneys for the Eastern Cherokees. This the Court did, upon proof of service (Rec., p. 8).

At this point we desire to call the attention of the Court to the alleged finding of fact made by the

inferior court and commented upon by the Court of Appeals to the effect that under the rules of the Court of Claims the attorneys of record had absolute control of the disposition of the fee allowed by the court; and the court not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the attorney of record. We have referred to this as an "alleged" finding of fact. It is not a finding of fact. It is a finding of law; and it is an incorrect finding of law. This Honorable Court can determine, notwithstanding this finding, whether the Court of Claims has the right to disregard the applications of attorneys, who are not the attorneys of record.

The Court of Claims cannot make valid rules which would prevent the consideration of the application of attorneys who are not attorneys of record. It has the right, under the law, to consider the claims of any attorneys. Therefore, it cannot be said that Dudley & Michener could not have made an application for fees to the Court of Claims.

As explanatory of the contract of Owen and Dudley & Michener, it was added in the contract (in contemplation of the refusal of the National Legislature to provide the fee) that the fee allowed to Owen for his service should not be subject to any demand by Dudley & Michener. If

that meant anything, it meant assuredly that Dudley & Michener could not expect to ride upon Owen's shoulders and secure a fee for services Owen had rendered. And it surely meant that Dudley & Michener must prove independently of him the services they had rendered to the Eastern Cherokees, and must show that they had rendered actual services in the collection of the claim, which would entitle them to receive a fee, the amount of which the Court of Claims was, under the law, to fix. And, inasmuch as Congress conferred upon the Court of Claims alone, the jurisdiction and authority to fix the fees of counsel, it was in that Court, and to that that Court, that the proof of service was to be made.

This Honorable Court knows from its own records that the judgment awarded in this case was for a very considerable sum; it knows that this sum was by its decree to be distributed among the descendants of persons who were members of the Eastern Cherokee Tribe in 1835 and 1846; it knows that such disbursement could not have been made immediately. This suit was brought upon the moment of the payment of the fee to Owen. Dudley & Michener could have filed a petition for their fees after the award of the fee to Owen. For aught we know they could bring suit now. They have chosen instead, to bring suit against Owen, notwithstanding their agreement to prove their own services and not to

hold Owen to liability for the payment of any part of their fee out of the fee awarded to him.

In this suit, for the first time, Dudley & Michener assert that they have rendered service in the prosecution of the claim of the Eastern Cherokees. If they had proved service they doubtless would have been awarded a fee in proportion to the services rendered. That fee might have been more, it might have been less, than appellant had contracted to pay them in contemplation of an appropriation by Congress.

In the absence of a finding by the Court as to the extent of Dudley & Michener's service we may not form an opinion as to the fee they would have been awarded if they had applied for one, nor are we permitted to speculate. It is certainly true that upon proof of service the Court of Claims might have awarded Dudley & Michener a fee less than ten thousand dollars ($10,000). As by compliance with the letter and spirit of the contract, such a result might have followed, it would seem that this judgment of the Court of Appeals, if confirmed, would give Dudley & Michener more than the Court of Claims might have allowed, and that the decision thereby offers an inducement to one holding such a contract to refuse to comply with its terms.

Against just such a result Owen stipulated in the contract; for, although its meaning on the point is

plain, although Owen was assured of being released from the obligation of the contract if the fee was "not provided for by legislation," and at the same time had reasonable assurance of services from Dudley & Michener, he made assurance double sure by providing that if in the event it became necessary to prove service, no part of his own fee was to be taken to pay the fee of Dudley & Michener, whether that fee should prove to be greater or less, than the amount he was to pay to Dudley & Michener if the fee was "provided for by legislation."

Let us suppose that Dudley & Michener had complied with the law and proved service, and the Court of Claims, upon such proof, had awarded them fifteen thousand dollars ($15,000)—surely Owen could not have complained. Let us suppose that the Court had allowed them but five thousand dollars upon their proof of service; is it possible that Dudley & Michener could have recovered five thousand dollars additional from Owen, when the court had fixed their fee and when Owen's fee was to be secure against any demand on their part? In either event the value of the services as expressed in the award of a fee was to be determined by the Court of Claims; and there was no prohibition against the allowance of a greater fee as there was no assurance against allowance of a smaller one. Yet, this decision accomplishes the fixing of a

fee against Owen of ten thousand dollars ($10,000) when no proof of any service is made, and makes it payable out of Owen's fee despite the positive agreement to the contrary. Congress passed the law which gave the power and authority to the Court of Claims to fix the fee. Congress *could* have provided the fee by legislation, but it chose not to do so. And when it gave the authority to the Court of Claims to fix the fee it then became the duty of Dudley & Michener to prove their service in that Court and to ask compensation therefor. In this they totally failed. That Act of Congress was the law—which every one is presumed to know. The presumption becomes intense since Dudley & Michener are lawyers. They do not pretend to ignorance, deception or fraud. It seems strange indeed that with a contract worth ten thousand dollars ($10,000), if Congress had provided a fee, Dudley & Michener did not deem it worth their while to prove service before the Court which they knew had the authority to estimate the value of those services and allow a fee.

Surely activity on the part of Dudley & Michener in making proof of their services was essential under their contract; and surely Owen is entitled to the benefit of his precaution in the provision that he should receive, in such event, whatever fee was allowed to him, without deduction therefrom for the

purpose of paying any fee to Dudley & Michener—whether they proved more or less of service than was contemplated in their contract.

For these reasons the judgment of the Court of Appeals in reversing the court of original jurisdiction was wrong, and it should be reversed.

WILLIAM H. ROBESON,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 142.

ROBERT L. OWEN, PLAINTIFF IN ERROR,

vs.

WILLIAM W. DUDLEY AND LOUIS T. MICHENER, DOING BUSINESS UNDER THE FIRM NAME OF DUDLEY & MICHENER, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

By leave of court granted at the conclusion of the oral argument, plaintiff in error presents this supplemental brief, being practically a reply brief to that filed for the defendants in error.

The attention of the court is explicitly called to a number of erroneous statements inserted in the brief filed by the defendants in error which are unsupported by the findings of fact.

For example, page 11, line 5, the brief states that Owen wrote Dudley & Michener to make up their account for the

services "which he knew they had rendered him." The findings of fact make no such statement and the statement is not true as a matter of fact.

A second error immediately follows, to wit:

> "He (Owen) then tells them that they need not do
> "so (furnish proof) until they are notified by him
> "to do it."

Nothing of the kind appears in the record, and it is not true as a matter of fact.

Another erroneous statement immediately follows, to wit:

> "He (Owen) then makes up his mind to make an
> "application for an allowance of fees, and he takes
> "every other associate of his into his confidence
> "except the defendants in error, and the Court of
> "Claims makes allowances to them—and out of what
> "does it make this allowance to them? It makes it
> "out of the full amount of fifteen per centum which
> "was the full amount to be paid to Vaile under
> "Vaile's contract with the Indians."

Nothing like this is found in the findings of fact. The amount of Vaile's contract is not mentioned. The taking of other associates into his confidence is not found in the findings of fact.

Such statements are highly prejudicial to the plaintiff in error.

The fact is the Court of Claims entertained the claims of numerous attorneys, including those antagonistic to the plaintiff in error, to wit: The claim of Belva A. Lockwood, employed on powers of attorney by several thousand Eastern Cherokees on a basis of 15 per centum of the recovery (see decree of Court of Claims of January 17, 1910); R. V. Belt, employed in the case four years previously to Owen's employment by contract of January 6, 1896 (Senate Document No. 143, 54th Congress, first session, paragraph 1),

under the authority of certain Eastern Cherokees of North Carolina.

John Vaile and his associates appeared under a contract made by an executive committee of a mass meeting of Eastern Cherokees held at Tucker's Springs, in Indian Territory, of September 4, 1901.

The total of these fees independently pledged by these various contracts was forty-five (45) per centum of the recovery. (record of Eastern Cherokee case, Court of Claims) and under these contracts many attorneys were employed.

These contracts of employment had no validity for the simple reason that there were thirty-two thousand Eastern Cherokees, citizens of the United States, who obviously could not be bound by a few of their number.

The validity of these contracts, as binding upon the Eastern Cherokees, was not insisted on by any of the attorneys.

In the case of the Western Cherokees the Supreme Court of the United States held, 148 U. S., 479, as follows:

> "The Old Settlers, the Western Cherokees, are not "a governmental body politic, nor have they a cor- "porate existence, nor any capacity to act collect- "ively."

This opinion applies with equal force to the Eastern Cherokees, whose status is identical.

The Supreme Court in the Western Cherokee case held that the commissioners, Wilson, Hendricks, and Bryan, had received no authority by the Old Settlers' councils, so called, to receive any part of the fund, *a principle of law which applies with equal force to the Eastern Cherokee's councils and any contracts made by them.*

The Court of Claims acted upon this principle in its decree and did not recognize the validity of any of the contracts, but *based its finding upon the evidence submitted and proof of services actually rendered,* using the expression in the face of the opinion of the court (Exhibit 1):

> "The court *having considered the evidence offered*
> " *by them* and *heard the argument of counsel* and
> " *being fully advised in the premises.*"

And thereupon the court allowed a sum equal to 15 per centum of the recovery, of which Belva A. Lockwood received $18,000, which was deducted in proportion from each of the attorneys in the case who had furnished proof of service, as follows, to wit:

John Vaile, 3 per cent, less	$3,600
R. V. Belt, 1⅔ per cent, less	2,000
Scarritt & Cox, 2 per cent, less	2,400
J. K. Jones, 1 per cent, less	1,200
M. C. Butler, 1½ per cent, less	1,800
W. H. Robeson, 1½ per cent, less	1,800
Robert L. Owen, 4⅓ per cent, less	5,200

Each of these attorneys made individual proof of service. (See opinion cited last page of this brief.)

The defendants in error in their brief again, page 11, line 19, state:

> "The court allowed all the fees contracted by the
> " Indians to be paid to John Vaile, to wit, 15 per
> " centum."

This erroneous statement is not within the findings of fact, is not true as a matter of fact, and is contradicted by the decree of the Court of Claims, herewith exhibited, of which this honorable court will take judicial cognizance (Exhibit 1).

Again, on page 12, line 2, in the brief of defendants in error, it is stated:

> "The findings of fact in this case show that no
> " one ever made any proof of any service; that the
> " Court of Claims required no proof of service by
> " any one," etc.

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Nothing of the kind appears in the findings of fact and the statement is not true as a matter of fact, each of the attorneys having rendered a sworn statement of services rendered with great particularity.

No proof of Dudley & Michener's service, however, was submitted to the court.

The point at issue in this case is whether Owen's personal fee allowed on proof of service by him, under the statute of March 3, 1903, authorizing the Court of Claims to fix the fees, is chargeable with fees claimed by Dudley & Michener under the contract by which Owen employed them.

The contract itself (R., p. 7) provides the payment by Owen of $10,000 to Dudley & Michener

> "out of the fees so pledged to said Owen immedi-
> " ately upon the collection, or *in the exact proportion*
> " as said fees may be collected, it being understood
> " and agreed that this contract is conditioned upon
> " the *collection of the fees aforesaid.* And in the
> " contingency of the *said fees* **not** being *provided*
> " *for by legislation* as per the contract of the Eastern
> " Cherokee council aforesaid, **but** upon *proof of serv-*
> " *ice,* then and in that event, each of the parties
> " hereto shall prove service independently of the
> " other, and said Owen shall not be expected out of
> " fees collected for his personal service, to pay the
> " fee to Dudley & Michener," etc.

The fee pledged by Vaile to Owen was only a portion of the amount pledged to Vaile. The Vaile contract was confessedly invalid and was not enforced and Owen was not paid by virtue of its validity but "upon proof of service." The fee awarded to Owen by the decree of the Court of Claims "upon proof of service" was 4¼ per cent, less $5,200 to Belva A. Lockwood. The findings of fact state neither of two matters essential to the interpretation of this contract in the contingency of the said fees *"being provided for by legislation."* If the fees had been *"provided for by legislation,"* the $10,000 was to be paid in the *exact pro-*

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portion as said fees pledged to Owen should be so collected. To determine the proportion it would be necessary to know the amount of the fee pledged to said Owen by the said Vaile, and it would also be necessary to know the amount paid to said Owen by the legislative act.

The trial court made no finding of fact on either of these two points—that is, of the amount contracted to Owen by Vaile nor the amount paid to Owen—for the obvious reason that the first proposal of the contract, to wit, the collection of fees by legislative act, was not claimed by any one. It was the alternative which was asserted as a basis of the claim of Dudley & Michener—that is, the allowance of fees "upon proof of service." The trial court held that nothing was due under the contract, for the obvious reason that Dudley & Michener had not complied with its terms in proving services, which they had obligated themselves to do.

The Court of Appeals, in overruling the decision of the trial court, was compelled to argue that the *proof of service* proposed in the contingency of the fees not being "provided for by legislation" was the proof of service contemplated and required by sections 2103, 2104, 2105, 2106 of the Revised Statutes before the Commissioner of Indian Affairs and the Secretary of the Interior.

These sections relate alone to contracts made with Indians "not citizens of the United States."

We submit with absolute confidence that nothing could be more erroneous. In the first place, proof is never made before the Commissioner of Indian Affairs or the Secretary of the Interior for services rendered to an Indian or to Indian tribes, except in those cases where contracts of employment have been submitted to and approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and then only with Indians "not citizens of the United States."

Owen had no such contract.

He could not have had such contract *with citizens of the United States* if he had desired to do so.

The contract of Vaile with the Eastern Cherokees was dated September 4, 1901 (Record, page 6), and the contract of Owen with Vaile was of that date. *"Every Indian in Indian Territory" having been made a citizen of the United States previously thereto,* to wit, March 3, 1901 (31 Stats., 1447), sections 2103-21 of the Revised Statutes did not apply and could not apply to such contract, and could not therefore have been in contemplation by the contracting parties as to proof of service.

This effectually eliminates the entire argument in the opinion of the Court of Appeals.

In interpreting the contract and the meaning of the parties thereto it is of the greatest importance to consider well-known facts within the knowledge of the contracting parties bearing upon such contract.

In interpreting the language of the contract where the contingency of the fees being "provided for by legislation" is referred, the Court of Appeals utterly misconceives the meaning of this language (Record, 13, last line) and says:

> "Surely it was never contemplated by either Owen
> " or appellants that Congress would directly fix the
> " fee Owen was to receive. All that in reason could
> " have been contemplated was that legislation might
> " be enacted similar to that which was enacted. If
> " the legislation, under which he received his fee,
> " did not come within the letter of the contract, it
> " certainly came within its spirit and hence within the
> " contract."

On the contrary, we very respectfully point out that Owen did have a right to contemplate that Congress might directly fix the fee he was to receive.

Congress did directly fix the fee of the attorneys *in the companion case of the Western Cherokees,* and on more than one occasion. (See 28 Stats., 451.)

Congress directly fixed the fee of John T. Heard in the Western Cherokee case at $10,000 (28 Stats., 1009).

Congress, on June 7, 1897, in the Western Cherokee case, directly fixed the fees in specific amounts for the following attorneys in the Western Cherokee case (30 Stats., 88), to wit:

William S. Peabody	$10,000.00
Chas A. Webb	2,500.00
Marcus Irwin	2,500.00
T. H. N. McPherson	2,500.00
Mary E. Carey, executrix	2,000.00
Jno. A. Sebbald	1,000.00
Sam. W. Peelle	2,500.00
Vorhees & Jones	2,500.00
David A. McKnight	2,000.00
Belva A. Lockwood	500.00
J. L. Baugh	2,500.00
Stephen W. Parker	2,500.00
Joel M. Bryan	5,215.06

At the very time of making this contract of May 28, 1902, with Dudley & Michener, Owen, as an attorney of the Eastern Cherokees, was pressing a bill before Congress, to wit, Senate bill No. 5685, Fifty-seventh Congress, first session, introduced by Senator Cockrell May 7, 1902, *for the direct appropriation* of the fund afterwards found by the Supreme Court of the United States to be due the Eastern Cherokees.

It proved impossible to pass this bill, Senate 5685, for a direct appropriation, and it had to be abandoned. Congress, on July 1, 1902, passed the Cherokee agreement, in which, by section 68, the Cherokee Nation was authorized to bring suit, and like authority was given to any band thereof. But the Eastern Cherokees, not being a band, were compelled to seek a modification of the act of July 1, 1902, which was done on March 3, 1903 (32 Stats., 996), in which it was provided that the Eastern Cherokees should have *"the status of a band"* for the purpose of bringing suit, and further, it was

"*Provided,* That the prosecution of such suit on the
" part of the Eastern Cherokees shall be through
" attorneys employed by their proper authorities,
" their compensation for expenses and services ren-
" dered in relation to such claim to be fixed by the
" Court of Claims upon the termination of such suit."

This alternative made necessary *the proof of service* contemplated as the second alternative in the contract between Owen and Dudley & Michener.

Owen thereafter in writing, April 17, 1905, notified Dudley & Michener of the necessity *of proof of service* (Record, page 7).

Dudley & Michener made none, and never thereafter presented any claim to the court under this law, but contented themselves with bringing a personal suit against Owen to require him to pay them out of fees which he had collected for his personal services, notwithstanding the fact that their contract was expressly to the contrary.

The contract was:

"But upon proof of services, then and in that event,
" each of the parties hereto shall prove service *inde-*
" *pendently* of the other, and said Owen *shall not be*
" *expected out of fees collected for his personal serv-*
" *ice, to pay the fee to Dudley & Michener.*"

It has not been at all unusual for fees to be "provided for by legislation," as was done in the Western Cherokee case above cited and in many other cases, including the case of the Turtle Mountain band of Chippewa Indians, where Congress awarded certain persons a fee of $50,000 and appropriated that amount (33 Stats., 195).

In like manner it has frequently occurred that Congress has sent attorneys to the Court of Claims where thei rfees might be fixed "upon proof of services," as was done in the intermarried white man case, recently tried before this honorable court, in which the Cherokees were concerned.

For this reason it was only natural that both contingen-

cies should be provided for—first, where the fees were *"provided for by legislation,"* and second, where they were provided for *"upon proof of service."*

The defendants in error urge that Owen waived proof of service by the defendants in error.

There is no such finding of fact and it is not true as a matter of fact that Owen in anywise changed the contract in this particular.

The defendants in error, on page 11 of their brief, say that Dudley & Michener could not have increased or diminished the allowance of the fees made by the court.

There is no warrant for this assertion, and the contrary appears from the action of the Court of Claims in making an allowance to Belva A. Lockwood, who was not associated with Owen, but antagonistic to him. We have heretofore answered this argument and think no further reference necessary thereto.

In the findings of the trial court it is stated that under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee and that the defendants in error could not, under those rules, have claimed any fee except by permission of the attorneys of record (Record, page 8).

It is submitted that this court will take judicial notice of the rules of the Court of Claims, and that, so doing, it will discover that there are no such rules as would have prevented the defendants in error applying for the allowance of a fee to themselves.

Besides this, it is the right of any member of the bar of the Court of Claims to make application for fees where the court has authority to allow fees. The authority under which the suit of the Eastern Cherokees was prosecuted and the fee allowed is in the following words:

> "That the prosecution of such suit upon the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, and their compensation for expense and services rendered in rela-

tion to such claim, to be fixed by the Court of Claims upon termination of such suit" (32 Stat. L., part I, p. 996).

On the hearing, the attorneys for the defendants in error read a portion of a recent decree of the Court of Claims of January 17, 1910 (No. 23214, Eastern Cherokees *vs.* United States, pp. 16), wherein it is shown in the dissenting opinion, that from the 15 per cent allowed to Owen, Belt, and their associates there was first deducted eighteen thousand dollars to be paid to Belva A. Lockwood. Counsel for plaintiff in error is not sure of his right to cite from this decree in order to dispute the finding that under the rules Dudley & Michener could not have applied for the allowance of a fee to themselves; but the proposition seems to be otherwise so thoroughly negatived that the reference seems entirely justified.

Respectfully submitted.

ROBT. L. OWEN,
Plaintiff in Error.
W. H. ROBESON,
Attorney for Plaintiff in Error.

(EXHIBIT 1.)

COURT OF CLAIMS.

THE CHEROKEE NATION	No. 23,199.
THE EASTERN CHEROKEES	No. 23,214.
THE EASTERN AND EMIGRANT CHEROKEES	No. 23,212.

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the annexed three (3) pages is a true copy of the Decree as to fees of Counsel, filed by the Court May 28, 1906, in the above-entitled causes.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington City, this 19th day of October, A. D., 1909.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

IN THE COURT OF CLAIMS.

THE CHEROKEE NATION	No. 23,199.
THE EASTERN CHEROKEES	No. 23,214.
THE EASTERN AND EMIGRANT CHEROKEES	No. 23,212.

vs.

THE UNITED STATES.

These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the *original decree of May 18, 1905,* in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to

the Court that by the said mandate it is provided that the second subdivision of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the Treaties of 1835-36 and 1846, exclusive of the Old Settlers, it is therefore so ordered and decreed.

And in accordance with said decree as it was directed to be, and is now, modified it is further ordered and decreed that the Secretary of the Interior prepare or cause to be prepared a list or roll of all persons coming within the said description entitled to share in the distribution of said fund; and in preparing the said list or roll of such persons the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851 upon which the per capita payments to the Eastern Cherokees was made, and make such distribution in pursuance of Article 9 of the treaty of 1846.

And this cause coming on to be further heard upon the application of Robert L. Owen and Robert V. Belt, attorneys of record for the Eastern Cherokees, and *Mrs. Belva A. Lockwood,* attorney of record in behalf of *certain individual claimants* styled "Eastern and Emigrant Cherokees," for the allowance of compensation to them and their associates as attorneys for the respective parties, and the Court *having considered the evidence offered by them* and heard the argument of counsel, and being *fully advised in the premises,* and being of the opinion that a sum equal to fifteen per-centum of the amount due and payable, under the terms of this modified decree, to the Eastern Cherokees, to wit, one million one hundred and eleven thousand two hundred and eighty-four dollars and seventy cents, with interest from June 12, 1838, to date of payment, will be a reasonable compensation to the said Robert L. Owen and Robert V. Belt and their associates, attorneys for the Eastern Cherokees, *and*

to Mrs. Belva A. Lockwood, attorney for certain individual claimants styled Eastern and Emigrant Cherokees, it is therefore, this 28th day of May, 1906, adjudged, ordered, and decreed that out of said sum named in item two of the decree payable to the Eastern Cherokees there shall first be deducted an amount equal to fifteen per centum thereof, principal and interest, as the compensation of said attorneys.

And it further appearing to the Court that of this fifteen per centum the sum of *eighteen thousand dollars is a reasonable fee to be paid to the said Mrs. Belva A. Lockwood* for her services rendered in this behalf, it is therefore ordered, adjudged, and decreed that out of the said amount there shall be paid to the said Mrs. Belva A. Lockwood the said sum of eighteen thousand dollars.

It is further ordered, adjudged, and decreed that the said fifteen per centum, less the deduction of the said eighteen thousand dollars, shall be distributed and paid to the following persons in the proportion named, to wit:

To John Vaile, 3% of such gross recovery, less.....	$3,600
To Robert V. Belt, 1⅔% of such gross recovery, less.	2,000
To Scarritt & Cox, 2% of such gross recovery, less..	2,400
To James K. Jones, 1% of such gross recovery, less.	1,2000
To Matthew C. Butler, 1½% of such gross recovery, less	1,800
To William H. Robeson, 1½% of such gross recovery, less	1,800
To Robert L. Owens, 4⅓% of such gross recovery, less	5,200

It is further ordered, adjudged, and decreed that the payment of the said fifteen per centum be made by the Secretary of the Treasury as herein directed immediately upon the appropriation by Congress for the payment of this judgment.

Filed May 28, 1906.

By the COURT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

ROBERT L. OWEN, *Plaintiff in Error.*
vs.
WILLIAM W. DUDLEY and LOUIS T. MICHENER, doing business under the firm name of Dudley & Michener, *Defendants in Error.* } No. 142.

STATEMENT.

This case comes before your Honors on a writ of error to the Court of Appeals of the District of Columbia, sued out herein for the purpose of reversing a judgment of that court against the plaintiff in error for ten thousand dollars ($10,000), with interest from July 14, 1906. The brief filed by the plaintiff in error we do not consider sets out the facts of the case as fully as is necessary for a clear understanding of the issue by the court, and we therefore desire to state them ourselves.

The suit was instituted by the defendants in error against the plaintiff in error on the 14th day of July, 1906, in the Supreme Court of the District of Columbia, and, after the issues were made up, the attorneys for the respective parties entered into a stipulation to try the case

before the court without a jury (Rec. p. 5), and the trial was had in that manner. At the conclusion of the testimony introduced by both parties, the defendants in error presented to the court a request for the following finding of facts:

> "On May 28, 1902, the plaintiffs and the defendant entered into the following contract:
>
> 'This memorandum of agreement witnesses that John Vaile, Esquire, of Forth Smith, Arkansas, having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by act of council of September 4th, 1901;
>
> And whereas, the said John Vaile has employed the services of Robert L. Owen, of Muscoga, Indian Territory, under his aforesaid contracts;
>
> Now therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners, of the firm of Dudley & Michener, the sum of ten thousand dollars ($10,000) out of the fees so pledged to the said Owen immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service, to pay the fee to said Dudley & Michener, but it is understood and agreed that he will in such a contingency do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

The said Dudley & Michener on their part agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

Witness our hands and seals in duplicate on this twenty-eighth day of May, 1902.

Robert L. Owen. (Seal.)
Dudley & Michener. (Seal.)

Thereafter the plaintiffs, on their part, gave to the defendant their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contract provided they should do.

On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

'The Southern,
St. Louis, April 17, 1905.

Dudley & Michener,
Washington, D. C.

Gentlemen:

I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in cases under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly,

R. L. Owen.'

A few days thereafter, the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be

appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims, the defendant, Owen, who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the court apportioned the fee of 15 per cent among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the court, and the court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the said attorneys of record.

Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to pre-

pare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905.

The defendant has never paid to the plaintiffs any sum on account of the said contract between him and plaintiffs."

And the court found these to be the only facts and all the facts that were proven in the case. No exceptions were taken by either side to the competency or admissibility of testimony during the progress of the trial, and when the court found the facts presented by the attorneys for the defendants in error to be proven, it was requested by them to find as a conclusion of law therefrom that the defendants in error were entitled to recover. The trial court refused to grant this conclusion of law, but on the contrary found in favor of the plaintiff in error and entered judgment for him.

From this judgment an appeal was taken to the Court of Appeals of the District of Columbia, in which the judgment of the lower court was reversed and a judgment in favor of the defendants in error entered. It is to correct the alleged errors in this judgment that the writ of error in this case was sued out.

It will thus be seen that there are but two questions presented to your Honors for your determination:

First, what is the true interpretation of the contract sued upon.

Second, if it should be held that it was necessary under the terms of that contract for the defendants in error to prove their services, was not such proof of services by them waived by the plaintiff in error?

I.

WHAT IS THE TRUE INTERPRETATION OF THE CONTRACT?

The contract between the plaintiff and defendants in error was one which was in turn based upon a contract between the plaintiff in error and one John Vaile, which was founded upon a contract between John Vaile and the Eastern Band of Cherokee Indians. It was under this last contract that the fee was to be paid by the Indians. It must, therefore, be presumed that the "proof of services" referred to in the contract between plaintiff in error and defendants in error was proof of service under the contract between Vaile and the Indians, and in compliance with the law as it stood when plaintiff and defendants in error made their contract. All the parties to this latter contract were men of eminence in their profession, and especially skilled in matters relating to the claims of Indians against the Government or among themselves. They knew the state of the law with reference to such matters at the time they entered into their contract, and must be presumed to have contracted with reference to it. On the 28th day of May, 1902, the date of this contract, the only law relative to the compensation of attorneys for services rendered to Indians was section 2104 of the Revised Statutes, which provides as follows:

> "* * * and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact

> in detail, and the Secretary of Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract."

In will be perceived that Section 2104 provides for a proportionate reduction by the Secretary of the Interior or the Commissioner of Indian Affairs from the amount named in a contract between the Indians and their attorneys, at the same time that it provides for the rendering of strict, itemized proof of service.

In this state of the law and with the Vaile contract before them, plaintiff and defendants in error contracted thus:

> "And in the contingency of the fees not being provided for by legislation, as per the contract with the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his personal service to pay the fees to said Dudley & Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted to them."

This language shows beyond question that the "proof of services," contemplated by the parties, was proof to the Secretary of the Interior under the provisions of Section 2104 R. S., and that this was contemplated only as a possible contingency, it being then the purpose of

Owen to secure from Congress legislation which would take the matter from out the jurisdiction and control of the Secretary. As we will hereafter show, this legislation was secured and no application was ever made to the Secretary for the allowance and payment of fees, and of course no "proof of services" was offered to him by anyone. The contingency contemplated by the parties to the contract not having arisen, of course the entire proviso relative to "proof of services" is as dead as if it had never been a part of the contract.

Within a few weeks after Dudley & Michener and Owen made their contract, to wit, on the first day of July, 1902 (32 Stat. L., Sec. 68, p. 726), Congress invested the Court of Claims with jurisdiction to hear and determine the controversy between the United States and the Cherokee Nation, or any band thereof, providing in that section that the payment of fees to counsel should be under the supervision of the Secretary of the Interior, in accordance with Section 2104 of the Revised Statutes, which we have above quoted. This was not satisfactory to Owen and he induced Congress to pass the act of March 3, 1903 (32 Stat. L., p. 996), construing Section 68 of the act of July 1, 1902, and conferring upon the Court of Claims the right to fix the compensation of the attorneys of the Eastern Cherokees.

It was under this last mentioned act that Owen was allowed his fees by the Court of Claims. It is needless to say that these two acts of Congress constitute "legislation." The fears entertained by Owen that his contract fee would or could be scaled down by the Secretary of the Interior were thus dispelled by legislation, and the fears of the necessity for an itemized account, subjected to his scrutiny, also had vanished.

II.

IF IT SHOULD BE HELD THAT IT WAS NECESSARY UNDER THE TERMS OF THAT CONTRACT FOR THE DEFENDANTS IN ERROR TO PROVE THEIR SERVICES, WAS NOT SUCH PROOF OF SERVICES BY THEM WAIVED BY THE PLAINTIFF IN ERROR?

In discussing this phase of the case it is well for your Honors to bear in mind three important matters found as proven facts:

First. "That the defendants in error, on their part, gave to the plaintiff in error their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contracct provided they should do."

Second. "Under said decree the plaintiff in error was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and the defendants in error."

Third. "The plaintiff in error has never paid to the defendants in error any sum on account of the said contract between him and said defendants in error."

We are not surprised that the brief filed on behalf of the plaintiff in error does not allude to this phase of the controversy, and does not refer to the conduct of the plaintiff in error in this respect. His conduct is difficult to defend. The findings of fact show that "on March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

"The Southern,
St. Louis, April 17, 1905.

Dudley & Michener,
Washington, D. C.

Gentlemen:

I expect to be at Riggs House about April 28, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28/02, as I am preparing decree and wish to protect your fee.

Yours truly,

R. L. Owen."

A few days thereafter the plaintiff, Michener, met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court, with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims, the defendant, Owen, who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an application to the Court of Claims for the allowance of 15 per cent of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the court apportioned the fee of 15 per cent among said Owen and Belt and those associate attorneys, in accordance with their several contracts."

This is the conduct of the plaintiff in error, who had

solemnly contracted with the defendants in error that he *"will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them."* He writes them to make up their account for the services which he knew they had rendered him, as he would need it. He then tells them that they need not do that until they are notified by him to do it. He then makes up his mind to make an application for an allowance of fees, and he takes every other associate of his into his confidence except the defendants in error, and the Court of Claims makes allowances to them—and out of what does it make this allowance to them? It makes it out of the full amount of 15 per cent, which was the full amount to be paid to Vaile under Vaile's contract with the Indians. If the defendants in error had been notified to make proof of their services in the Court of Claims, as is now contended, they could not have increased or diminished the amount of the allowance of fees made by the court one penny. The court allowed all the fees contracted by the Indians to be paid to John Vaile, to wit, 15 per cent. The matter of the apportionment of that fee among Owen and his associates was left by the Court of Claims to Owen and his associates, as they might agree upon among themselves, and Owen did not notify these defendants in error of his intention either to apply for his fees or to disburse them. The last analysis of the defence interposed by the plaintiff in error here to the claim of Dudley & Michener would compel this court to so construe the contract between the parties that Dudley & Michener could not recover a single penny from Owen unless the names of both John Vaile and Robert L. Owen were actually written into an appropriation act of Congress.

We desire to say one more word on this question of proof of services. The findings of fact in this case show that no one ever made any proof of any service; that the Court of Claims required no proof of services by any one, for the simple reason that the Court of Claims was fully advised of the nature, character and extent of the services which had been rendered by Mr. Owen and his associates.

We therefore respectfully submit that the judgment of the Court of Appeals of the District of Columbia should be affirmed, and with great deference suggest that the record presents a case in which the court should impose upon the plaintiff in error the penalties prescribed by its rules and practice against persons who sue out vexatious and frivolous writs of error merely for delay.

SAM'L A. PUTMAN,
CHARLES POE,
Attorneys for Defendants in Error.

OWEN *v.* DUDLEY & MICHENER.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 142. Argued April 7, 8, 1910.—Decided May 16, 1910.

In this case a contract made by the attorney of record with associate counsel for professional services to be paid out of fees in an Indian litigation in the Court of Claims construed; and, although the contract provided that in case the fees were not provided for by legislation but had to be proved each party should prove his fee independently, *held*, that as the attorney of record had collected without legislation the entire fee originally contemplated and allowable he must account for the amount so collected by him and pay the associate counsel the amount agreed under the contract.

31 App. D. C. 177, affirmed.

THE facts, which involve the construction of a contract for legal fees, are stated in the opinion.

Mr. William H. Robeson for plaintiff in error.

Mr. Samuel A. Putman and *Mr. Charles Poe* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This action was brought in the Supreme Court of the District of Columbia by defendants in error against plaintiff in error to recover the sum of ten thousand dollars ($10,000), alleged to be due on account of the following contract entered into by the parties:

"This memorandum of agreement witnesses: That John Vaile, Esq., of Fort Smith, Ark., having been employed by the Eastern Cherokee Council of the Cherokee Nation, Indian Territory, under contract of February and April, 1900, and ratified a third time by that council of September 4, 1901;

"And whereas, the said John Vaile has employed the services of Robert L. Owen, of Muscogee, Indian Territory, under his aforesaid contracts:

"Now, therefore, the premises considered, the said Owen hereby contracts and agrees to convey to W. W. Dudley and L. T. Michener, partners of the firm of Dudley & Michener, the sum of ten thousand dollars ($10,000) out of the fee so pledged to the said Owen, immediately upon the collection, or in the exact proportion as the said fees may be collected, it being understood and agreed that this contract is conditioned upon the collection of the fees aforesaid. And in the contingency of the said fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected, out of fees collected for his personal service, to pay the fee to the said Dudley & Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley & Michener to collect the fee hereby contracted by them.

"The said Dudley & Michener, on their part, agree to give their co-operation in the collection of the money due the Eastern Cherokees and to assist the said Owen as associate counsel in this case.

"Witness our hands and seals in duplicate on this 28th day of May, 1902.

"(Signed)	ROBERT L. OWEN.	[SEAL]
"(Signed)	DUDLEY & MICHENER.	[SEAL]"

The question in the case turns upon the construction of the following provision of the contract: "And in the contingency of the fees not being provided for by legislation, as per the contract of the Eastern Cherokee Council aforesaid, but upon proof of services, then, and in that event, each of the parties hereto shall prove service independently of the other, and said Owen shall not be expected out of fees collected for his

personal service to pay the fees to the said Dudley and Michener, but it is understood and agreed that he will, in such a contingency, do what he can to assist Dudley and Michener to collect the fees hereby contracted by them." Certain facts were found by the trial court as helping to clear up, with the statute law then existing, the ambiguity of the provision. That court deduced from them a meaning favorable to plaintiff in error. The Court of Appeals found in them evidence of a different meaning and reversed the judgment of the trial court. The facts found, in addition to the agreement, are as follows:

"On March 20, 1905, the Court of Claims rendered a judgment in the case of the Eastern Cherokees against the United States. On April 17, 1905, the defendant, Owen, addressed the following letter to the plaintiffs:

'The Southern,
'St. Louis, April 17, 1905.

'Dudley & Michener, Washington, D. C.

'Gentlemen: I expect to be at Riggs House about April 28th, 1905, and wish by that time you would make up a careful affidavit of services rendered in case under contract of May 28, '02, as I am preparing decree and wish to protect your fee.

'Yours truly, R. L. Owen.'

"A few days thereafter the plaintiff Michener met the defendant, and was told by him that he had abandoned the purpose to make application for fees at that time and would postpone said application until after the Supreme Court of the United States, to which the said case was to be appealed, had acted thereon, and the application was so postponed by the defendant Owen. The judgment of the Court of Claims was affirmed by the Supreme Court with a slight modification. After the return of the mandate of the Supreme Court to the Court of Claims the defendant Owen, who was one of the attorneys of record in the case in the Court of Claims, together with his co-attorney of record, R. V. Belt, made an applica-

tion to the Court of Claims for the allowance of 15 per cent of the judgment to them as their fee. By agreement between the said Owen and Belt and certain of their associate attorneys, other than the plaintiffs, and without notice from defendant to the plaintiffs, the court apportioned the fee of 15 per cent among said Owen and Belt and those associate attorneys, in accordance with their several contracts.

"Under the rules of the Court of Claims the attorneys of record had absolute control of the distribution of the fee allowed by the court, and the court, not recognizing any associate counsel, save as directed by the attorneys of record, the plaintiffs could not, under the rules of the court, have claimed any fee except by permission of the said attorneys of record.

"Under said decree the defendant, Owen, was allowed and was paid the full amount of fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener.

"The plaintiffs were not parties to the said agreement between Owen and Belt, as attorneys of record, and said associate counsel, and had no further notice from Owen that any application was to be made to the court to apportion fees to any counsel except attorneys of record, nor were they ever further notified by the defendant to prepare and render proof of their services after the interview between the plaintiff Michener and the defendant, in April, 1905."

The trial court also found that defendants in error gave plaintiff in error "their co-operation, assistance and services in the prosecution and collection of the claim referred to in said contract, as said contract provided they should do," and that they have not been paid anything therefor.

The contentions of the parties are in sharp opposition. Plaintiff in error contends that the "contingency" provided for in the passage which we have quoted was direct and positive legislation, fixing his fee, and cites instances of such legislation as examples in the minds and intention of the parties.

Defendants in error contend that the legislation contemplated was that which would exempt plaintiff in error from making proof of service to the Commissioner of Indian Affairs and to the Secretary of the Interior under §§ 2103 to 2106, both inclusive, of the Revised Statutes of the United States. And that the acts of Congress which we shall presently refer to constitute such legislation.

That some legislation there might be is conceded by both parties. That some proof of service might become necessary is also conceded by both parties. The disagreement is as to what tribunal, whether the Secretary of the Interior and the Commissioner of Indian Affairs or the Court of Claims. There was some legislation, and this is urged by defendants in error as proof of their contention; there was in a sense a proof of services required, and this is urged by plaintiff in error as a support of his contention. It must therefore be conceded that each contention has plausible support, and the different meanings which the lower courts assigned to the agreement show its ambiguity. The trial court, as we have seen, taking the view contended for by plaintiff in error, the Court of Appeals that urged by defendants in error, and decided that the contract referred to the proof of services required by §§ 2103 to 2106.

Those sections provide that no agreement shall be made by any person with any tribe of Indians or individual Indians *not citizens of the United States* (italics ours) unless the agreement be in writing and in duplicate and (§ 2103, 2d par.) "be executed before a judge of a court, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it." Many other formalities are prescribed, and it is provided that contracts and agreements made in violation of the section "shall be null and void, and all money or other thing of value . . . in excess of the amount approved by the Commissioner and Secretary for such services may be recovered by suit in the name of the United States, . . . regardless of the amount in controversy."

By § 2104 it is provided that no money shall be paid under such contract except for fees due thereunder and by the United States through its officers or agents, and not until a sworn statement be filed with the Commissioner of Indian Affairs, showing each particular act of service, giving date and facts in detail, "and the Secretary of the Interior and the Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and if not, it shall be paid in proportion to the services rendered under the contract." It is provided in § 2105 that if any person receives money contrary to the provisions of the preceding section he shall forfeit the sum paid, and be punished by fine and imprisonment.

It will be observed that these provisions apply to Indians *not citizens of the United States*, and it is pointed out that the Eastern Cherokees became citizens March 3, 1901, c. 868, 31 Stat., pt. 1, p. 1447. That may be true, but the foundation of Owen's right to the fee was under an agreement with John Vaile, and the latter's right to engage Owen depended upon a contract with the Indians made in February and April, 1900, that is, a contract which was made before citizenship had been conferred upon the Indians. It certainly can be contended that when the Vaile contract was made it was subject to the provision of §§ 2103 *et seq.*, and that the approval of the Commissioner of Indian Affairs and the Secretary of the Interior was necessary to give it validity. It is true that it was ratified by the Indians September the 4th, 1901, that is, after they had been made citizens, but the effect of that might be disputed, and there being elements of doubt about it plaintiff in error and defendants in error well might have supposed the contract would be subject to the provisions of the Revised Statutes quoted above. The fact that legislation was sought confirms such view. If the Indians after March 3, 1901, had the same power to contract and the same extent of responsibility as white citizens, their contract would

need no confirmation by legislation. But such freedom of contract was certainly not supposed to exist. It is not without importance that the first act passed contained a limitation of it, and adopted the proof of services required by the Revised Statutes. That act conferred jurisdiction on the Court of Claims to hear and determine the claim of the Indians and provided that any suit brought under it should "be through attorneys employed and to be compensated in the manner prescribed in sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States."

It must therefore have been a proof of services by sworn statement, as provided in the sections referred to, that the parties contemplated. There were no other provisions in existence and there is not a circumstance to show that in the legislation that was looked forward to there would be provision for a proof of services which should supersede the contract of Vaile with the Indians and be the means through which Owen would be compensated. The legislation which was finally secured cannot be said to have required or provided for a proof of services in the sense that those words are used in the contract of plaintiff in error and defendants in error.

The final act was passed March 3, 1903. It made the Eastern Cherokees, so called, including those in the Cherokee Nation, a band or bands for all purposes of § 68 of the act of July 1, 1902, and provided that the prosecution of the suit in the Court of Claims on the part of the Eastern Cherokees should "be through attorneys employed by their proper authorities, their compensation for expense and services rendered in relation to such claim to be fixed by the Court of Claims upon the determination of such suit." March 3, 1903, c. 994, 32 Stat. pt. 1, p. 996. In other words, it recognized whatever contract of employment that should be made by the Indians with their attorneys, and it gave the Court of Claims power over the amount of compensation. But that such power might be given, or rather that there might be a limitation of the amount agreed upon, and therefore a re-

duction of the amount to be received by the plaintiff in error under the Vaile contract, was contemplated. The agreement recites that he (plaintiff in error) had been employed by Vaile, and that he agrees "to convey" to defendants in error "the sum of ten thousand dollars ($10,000.00) out of the fees so placed" to him "immediately upon the collection, *or in the exact proportion as the said fees may be collected*" (italics ours). It seems to us, therefore, that the contract contemplated two contingencies and provided for them. (1) That the fee of plaintiff in error might receive reduction, even if it should be specifically provided for by legislation. In such case the amount to be paid to defendants in error would be proportionately reduced. (2) That if the fee as fixed by the Vaile contract should be subject to supervision by the Commissioner of Indian Affairs and the proof of services required as provided by § 2104, then the parties should make such proof independently.

It is contended by plaintiff in error that "the Vaile contract was confessedly invalid and was not enforced and Owen (plaintiff in error) was not paid by virtue of its validity, but upon 'proof of service.'" The contention as to the invalidity of that contract is made for the first time in a supplemental brief filed by plaintiff in error after the oral argument. The contract had no validity, it is said, "for the simple reason that there were thirty-two thousand Eastern Cherokees, citizens of the United States, who obviously could not be bound by a few of their numbers." The purpose of the contention, no doubt, is to show that the contract was not, and that proof of services was, the ground of the action of the Court of Claims. And yet it is conceded that to Vaile was assigned three per cent of the fee allowed by the court. Why? It may be asked, and what other evidence is there in the record that plaintiff in error had any authority to appear for the Indians except through his engagement by Vaile? He was one of the attorneys of record—how did he become such? May we assume that it was in some other way than the record shows?

The contention, however, has not much relevancy. The agreement sued on states the authority of plaintiff to be the Vaile contract and the foundation of his power to engage defendants in error. His services and their services get their sanction from that contract, and according to the findings of the trial court he "was paid the full amount of the fees contemplated to be received by him according to the terms of the said contract between him and Dudley & Michener."

Our construction of the contract is fortified by that finding. It is also fortified by the letter which plaintiff in error addressed to the defendants in error April 17, 1905, which is set out in the bill of exceptions, and the subsequent conversation he had with them. It is also fortified by the finding of the trial court that the attorneys of record had absolute control of the distribution of the fees. The latter finding is attacked by plaintiff in error, and it is asserted that it has no justification in the rules of the Court of Claims, and is contradicted by the fact that fees were allowed others for services. We must take the record as we find it, and under what circumstances fees were allowed others does not appear. But the fact does appear, and we repeat it because we regard it as especially pertinent, that the plaintiff in error received the fees and the exact fees that he expected to receive by his contract with Vaile with aid of legislation, upon which event he promised to pay defendants in error ten thousand dollars ($10,000) for their services. And there is no denial that they rendered them, and no question is made of their value and efficiency.

Judgment affirmed.